Hobson's Choice: Ensuring Open Government or Conserving Government Funds, A

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A Hobson’s Choice:
Ensuring Open Government or Conserving Government Funds

Hemeyer v. KRCG-TV

I. INTRODUCTION

Part and parcel of American democracy is the notion that governmental functions should be carried out in a manner that is open to public scrutiny and accessible to the people. Capturing this belief, sunshine laws and freedom of information statutes requiring public access to government meetings and records began to emerge as early as 1898. Following the 1966 passage of the Federal Freedom of Information Act, states that lacked such provisions adopted open records and open meetings laws. Currently, all fifty states and the District of Columbia have statutory provisions that allow public access to official records and meetings. However, these provisions vary widely from state to state. Despite the diversity, more than half of the states, including Missouri, and the District of Columbia have enacted overarching statements of public policy that stress the importance of openness and accessibility as part of their open records and open meetings laws.

1. 6 S.W.3d 880 (Mo. 1999).
6. See Student Journalist, supra note 5, at 44-45.
In *Hemeyer v. KRCG-TV*, a case that arose when the Cole County Sheriff filed suit seeking a judicial determination supporting closure of a videotape of a legislator’s booking on drunk driving charges, the Missouri Supreme Court reiterated the public policy statement of openness that is part of the state’s Sunshine Law.\(^8\) To give broad effect to the policy of openness, as prescribed in the Sunshine Law, the court interpreted a component of the Sunshine Law’s remedial provision,\(^9\) Missouri Revised Statutes Section 610.027.5 (“Subsection


9. The remedial provision of Missouri’s Sunshine Law is contained in Missouri Revised Statutes Section 610.027, which reads in its entirety as follows:

1. The remedies provided by this section against public governmental bodies shall be in addition to those provided by any other provision of law. Any aggrieved person, taxpayer to, or citizen of, this state, or the attorney general or prosecuting attorney, may seek judicial enforcement of the requirements of sections 610.010 to 610.026. Suits to enforce sections 610.010 to 610.026 shall be brought in the circuit court for the county in which the public governmental body has its principal place of business.

2. Once a party seeking judicial enforcement of sections 610.010 to 610.026 demonstrates to the court that the body in question is subject to the requirements of sections 610.010 to 610.026 and has held a closed meeting, record or vote, the burden of persuasion shall be on the body and its members to demonstrate compliance with the requirements of sections 610.010 to 610.026.

3. Upon a finding by a preponderance of the evidence that a public governmental body or a member of a public governmental body has purposely violated sections 610.010 to 610.027, the public governmental body or the member shall be subject to a civil fine in the amount of not more than five hundred dollars and the court may order the payment by such body or member of all costs and reasonable attorney fees to any party successfully establishing a violation of sections 610.010 to 610.026.

4. Upon a finding by a preponderance of the evidence that a public governmental body has violated any provision of sections 610.010 to 610.026, a court shall void any action taken in violation of sections 610.010 to 610.026, if the court finds under the facts of the particular case that the public interest in the enforcement of the policy of sections 610.010 to 610.026 outweighs the public interest in sustaining the validity of the action taken in the closed meeting, record or vote. Suit for enforcement must be brought within one year from which the violation is ascertainable and in no event shall it be brought later than two years after the violation. This subsection shall not apply to an action taken regarding the issuance of bonds or other evidence of indebtedness of a public governmental body if a public hearing, election or public sale has been held regarding the bonds or evidence of indebtedness.
5"), liberally against the Cole County Sheriff.\(^\text{10}\) As a result of its liberal
construction of Subsection 5, the court held that the sheriff was required to pay
the television station's suit-related attorney fees.\(^\text{11}\) In so holding, the court
provided a booster for the public policy of openness that underlies Missouri's
Sunshine Law,\(^\text{12}\) by eliminating the possibility that a governmental agency will
employ its resources to force an economically weaker record seeker to forego his
or her right of access to public records due to the costs associated with being
forced to defend in court.

This Note supports the analysis of and the decision reached by the Missouri
Supreme Court in Hemeyer. Both are consistent with the public policy of
openness explicitly provided in the state's Sunshine Law,\(^\text{13}\) as well as in other
Missouri record-related statutes that were in effect at the time of the decision.\(^\text{14}\)

II. FACTS AND HOLDING

On the evening of April 25, 1997, the Cole County Sheriff's Department
arrested State Representative Mark Richardson of Poplar Bluff and charged him
with driving while intoxicated.\(^\text{15}\) Security cameras installed in the booking area
of the Cole County Jail recorded a portion of Representative Richardson's
booking as part of the normal operation of the jail's videotaping security

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5. A public governmental body which is in doubt about the legality of closing
a particular meeting, record or vote may bring suit at the expense of that
public governmental body in the circuit court of the county of the public
governmental body's principal place of business to ascertain the propriety of
any such action, or seek a formal opinion of the attorney general or an
attorney for the governmental body.


10. See Hemeyer, 6 S.W.3d at 882. For the text of Subsection 5, see supra note 9.

11. See Hemeyer, 6 S.W.3d at 882 (adopting the reasoning of City of Springfield
App. 1996)); infra notes 91-103 and accompanying text.


13. See MO. REV. STAT. § 32.091 (Supp. 1997), repealed by H.B. No. 1797, 90th


15. See Hemeyer v. KRCG-TV, No. WD 54950, 1999 WL 118287, at *1 (Mo. Ct.
App. Mar. 9, 1999), vacated, 6 S.W.3d 880 (Mo. 1999); Police Videotapes of Bookings
Richardson was House Minority Leader at the time of the arrest. See Video of DWI
addition, he had his daughter with him at the time of the incident and "eventually pleaded
guilty to misdemeanor counts of first-offense driving while intoxicated and child
endangerment." Id.
system.16 Installed to monitor activities for the benefit of staff and prisoners, this system sequentially taped on a rotational basis among twenty-eight video cameras located throughout the facility.17 In the course of its usual operation, the system used six tapes per day.18 The jail maintained a bank of numbered tapes specifically for use in the videotaping system, and the tapes were sequentially rotated, which resulted in each tape being “reused approximately every four and one-half days.”19

Aware of the Cole County Jail’s videotaping system, KRCG-TV, a local television station, directed a written request to Cole County Prosecuting Attorney Richard Callahan two days after Richardson’s arrest.20 In its letter, the television station requested all documentation related to the representative’s drunk driving arrest, including “a copy of the booking tape,” for use in a news story.21

In response to KRCG-TV’s request, Cole County Sheriff John Hemeyer invoked Subsection 5 of the Sunshine Law’s remedial provision22 and filed a petition for declaratory judgment with the Cole County Circuit Court in Jefferson City on May 1, 1997.23 Hemeyer’s petition sought to determine “whether any portion of the videotape constituted a public record” pursuant to Chapter 610 of the Missouri Revised Statutes.24 Ruling in favor of Hemeyer, the circuit court held that the videotape that included the representative’s booking did not constitute a public record because it was not prepared in relation to official governmental business and because it was not a retained law enforcement record as the tapes were routinely reused.25 Therefore, the circuit court held “that the tape was not subject to the disclosure requirements of Chapter 610.”26

KRCG-TV appealed to the Missouri Court of Appeals for the Western District of Missouri,27 which concurred with the circuit court’s holding but remanded the case for further proceedings in order for the circuit court to “make findings and enter an award of attorney[’] fees” for the television station pursuant to Subsection 5 of the Sunshine Law’s remedial provision.28 However, prior to

17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id. For the text of Subsection 5, see supra note 9.
24. Id.; see infra text accompanying notes 82-84.
26. Id.
27. Id.
28. Id. at *6.
reconsideration of the case by the circuit court, the Missouri Supreme Court vacated the court of appeals' decision and granted transfer.29

On the issue of the public record status of the videotape, KRCG-TV argued that because the booking video constituted a public record in accordance with Missouri Revised Statutes Section 610.010(6),30 which defines public records for the purposes of the Sunshine Law, it should be open for public inspection and duplication pursuant to Section 610.011.31 KRCG-TV's argument was based on the parties' stipulation that the sheriff is a public governmental body, the sheriff's possession of the videotape at the time of the request for access, and the fact that the sheriff did not invoke any of the open record exemptions provided in Missouri Revised Statutes Section 610.021.32 The sheriff counterargued that the tape did not qualify as a public record pursuant to the definitions of "record" in Chapters 109 and 610 of the Missouri Revised Statutes because it was not created in relation to official business and because the tapes were regularly reused, rather than retained.33

With regard to the issue of attorney fees, KRCG-TV asserted that because the sheriff brought the suit under Subsection 5 of the Sunshine Law's remedial provision, the television station was entitled to recoup its expenses, including attorney fees.34 In counterargument, the sheriff claimed that KRCG-TV should not be awarded attorney fees because KRCG-TV did not present evidence on attorney fees at the trial court and because the sheriff did not purposely violate the Sunshine Law, as required by Missouri Revised Statutes Section 610.027.3 ("Subsection 3").35

The Missouri Supreme Court vacated the appellate decision, unanimously holding that the videotape, which normally would have been "retained for four-and-a-half days," was a public record in accordance with Chapter 610 of the Missouri Revised Statutes.36 The court's reasoning hinged on use of the term "record" in Chapter 610, rather than Chapter 109, and the liberal construction

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29. See Hemeyer v. KRCG-TV, 6 S.W.3d 880, 881 (Mo. 1999).
32. See Hemeyer, 6 S.W.3d at 881; Appellant's Substitute Brief at 10-16, Hemeyer (No. SC 81610). For the exemptions provided in Missouri Revised Statutes Section 610.021, see infra note 85.
33. See Hemeyer, 6 S.W.3d at 881-83; Respondent's Substitute Brief at 7-10, Hemeyer (No. SC 81610). For the definition of "record" pursuant to Chapters 109 and 610 of the Missouri Revised Statutes, see infra text accompanying notes 63, 82-84.
34. See Hemeyer, 6 S.W.3d at 882-83. Subsection 5 of the Sunshine Law's remedial provision does not specifically mention attorney fees—rather it states that: "[a] public governmental body . . . may bring suit at the expense of that public governmental body." Mo. Rev. Stat. § 610.027.5 (2000).
35. See Hemeyer v. KRCG-TV, 6 S.W.3d 880, 883 (Mo. 1999). For the text of Subsection 3, see supra note 9.
36. Hemeyer, 6 S.W.3d at 882.
requirement found in Missouri Revised Statutes Section 610.011.1, which states that in order “to promote [the] public policy” of Missouri “records . . . of public governmental bodies be open to the public unless otherwise provided by law.”37 Furthermore, in a four-to-three decision, the court held that a liberal construction of Subsection 5 was required to maintain the public policies underlying Chapter 610 and that such a liberal construction provided for an award of attorney fees to the record requestor through the statute’s language—suit “at the expense of that public governmental body.”38

III. LEGAL BACKGROUND

A. General Overview of Missouri’s Open Records Laws

In 1973, the Missouri General Assembly first enacted the Missouri Sunshine Law,39 which applies to both open meetings and open records.40 The law has been amended on numerous occasions during the twenty-seven years ensuing its original enactment.41 Through one such amendment in 1987, the legislature added a policy statement42 that expressly declared Missouri’s dedication to the openness of government.43 This provision, Missouri Revised Statutes Section 610.011.1, reads, in part: “[i]t is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law.”44

Missouri courts have had numerous opportunities to interpret and apply this statutory policy statement. In so doing, the courts generally have deferred to the intent of the General Assembly through statements in dicta, such as: “[t]he open meetings and records law recognizes that the public has an interest in seeing how its government operates”;45 “[t]he Missouri law properly recognizes the public

37. Id.
38. Id. at 883; see infra text accompanying notes 93-103.
39. See 20 ALFRED S. NEELY, MISSOURI PRACTICE: ADMINISTRATIVE PRACTICE & PROCEDURE §§ 14.01-.03, 15.01 (2d ed. 1995); see also MO. REV. STAT. §§ 610.010-.200 (2000).
40. See NEELY, supra note 39, at §§ 14.01, 15.01.
41. See NEELY, supra note 39, at §§ 14.01, 15.01.
42. See NEELY, supra note 39, at §§ 14.01-.03, 15.01.
45. State ex rel. Mo. Local Gov’t Ret. Sys. v. Bill, 935 S.W.2d 659, 665 (Mo. Ct.
interest in an open government’’; and ‘‘[t]he law reflects Missouri’s commitment to openness in government.’’ The courts have done so even when giving effect to the strong policy towards openness produced a less-than-palatable result. Even before the amendment containing the express policy statement was added, Missouri courts were proponents of the underlying doctrine of open government, which was subsequently incorporated through the express policy statement in the 1987 amendment.

In addition to expressing the statute’s overarching policy that governmental activities should be conducted ‘‘in a manner that is open to public scrutiny,’’ the General Assembly established a presumption in favor of openness through Missouri Revised Statutes Section 610.011.1. The General Assembly accomplished this by ‘‘indicat[ing] how it desires the judiciary to approach the statute—in a spirit of liberal construction where it demands openness and a spirit of strict construction where it permits nondisclosure.’’ To this end, Section 610.011.1 provides that the state’s Sunshine Law ‘‘shall be liberally construed


[W]hile we reach this conclusion [that the requested records must be released as they are public records] based on the provisions of the Sunshine Law, we do so with a firm conviction that the Legislature neither contemplated nor intended that private health care providers would use the law to gain competitive advantage over much needed public institutions . . . [as] widespread use of the law for this purpose could have a devastating impact on public health care facilities throughout the state.

Id.

49. See Cohen v. Poelker, 520 S.W.2d 50, 52 (Mo. 1975). The court stated, in dicta, that:

The several sections of Chapter 610, considered together, speak loudly and clearly for the General Assembly that its intent in enacting the Sunshine Law . . . was that all meetings of members of public governmental bodies . . . at which the peoples’ business is considered must be open to the people and not conducted in secrecy, and also that the records of the body and the votes of its members must be open.

Id.; see also Hyde v. City of Columbia, 637 S.W.2d 251, 262 (Mo. Ct. App. 1982) (stating, in dicta, that ‘‘[t]he clear purpose of the Sunshine Law is to open official conduct to the scrutiny of the electorate’’).

50. See Neely, supra note 39, at §§ 14.01-03, 15.01; MO. REV. STAT. § 610.011 (2000).
51. McCaskill, supra note 43.
53. Neely, supra note 39, at § 14.03.
and [its] exceptions strictly construed to promote this public policy."54 Missouri courts have been presented with ample opportunities to apply this construction mandate, and they often have followed it.55 Furthermore, the policy provision in Section 610.011.1 is shored up by the statutory presumption in Section 610.022.56 that "[p]ublic records shall be presumed to be open unless otherwise exempt pursuant to the provisions of this chapter,"57 and by the stipulation in Section 610.015 that "[a]ll public meetings shall be open to the public and public votes and public records shall be open to the public for inspection and duplication."58 Finally, Section 610.026, which governs the fees that governmental bodies can charge for furnishing copies of public records, also echoes the spirit of openness expressed in Section 610.011 by decreeing that "[f]ees for copying public records shall not exceed the actual cost of document search and duplication."59

54. MO. REV. STAT. § 610.011.1 (2000). For exemptions provided in Missouri Revised Statutes Section 610.021, see infra note 85. See generally SUNSHINE LAW, supra note 43.

55. See State ex rel. Mo. Local Gov't Ret. Sys. v. Bill, 935 S.W.2d 659, 664 (Mo. Ct. App. 1996) (stating, in dicta, that "public records must be presumed open to public inspection unless they contain information which clearly fits within one of the exemptions set out in [Section] 610.021"); Pulitzer Publ'g Co. v. Mo. State Employees' Ret. Sys., 927 S.W.2d 477, 482 (Mo. Ct. App. 1996) (holding, in part, that promotion of the Sunshine Law's express public policy requires "that the law be liberally construed and that the exceptions thereto be strictly construed"); State ex rel. Jackson County Grand Jury v. Shim, 835 S.W.2d 347, 348-49 (Mo. Ct. App. 1992) (holding, in part, that exemptions to the Sunshine Law are to be strictly construed and are not to be extended "beyond the express language used to declare when records are closed," and that courts are "bound by the declared public policy of the legislature that records shall be open to the public unless otherwise provided and any exception is to be strictly construed"); Librach v. Cooper, 778 S.W.2d 351, 353 (Mo. Ct. App. 1989) (stating, in dicta, that the Sunshine Law addresses the inherent tension between the public's need for open government and individuals' need for privacy by "exceptions [to disclosure] that are to be narrowly construed"). But see Spradlin v. City of Fulton, 982 S.W.2d 253, 261 (Mo. 1998) (finding that statutes allowing awards of attorney fees may be penal and, therefore, must be strictly construed, and that the public policy of openness "relates only indirectly, if at all, to the attorney[] fees penalty provided in [S]ection 610.027.3 . . . [which] requir[es] strict interpretation" due to its penal nature); Kan. City Star Co. v. Shields, 771 S.W.2d 101, 104 (Mo. Ct. App. 1989) (stating, in dicta, that the fines provided for in Missouri Revised Statutes Section 610.027.3 are penal in nature and, therefore, that portion of the statute is to be strictly construed in spite of the court's recognition of the Sunshine Law's express public policy and command that provisions, other than exemptions, be liberally construed).

56. See NEELY, supra note 39, at § 15.03.

57. MO. REV. STAT. § 610.022.5 (2000).


However, Chapter 610, which codified Missouri’s Sunshine Law, "was not the first comprehensive Missouri legislation on the subject of open records, and today is not the only legislation of this nature." Enacted in 1961, and currently in force, Missouri Revised Statutes Section 109.180 requires that "all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen." In addition to Section 109.180, Chapter 109 includes a number of provisions that relate to the retention, maintenance, and disposal of state and local records. Specifically, Section 109.210(5) defines the term "record" as it is used in Chapter 109, by requiring that an item deemed a record must have been "made or received pursuant to law or in connection with the transaction of official business." Moreover, Sections 109.230 through 109.280 and Section 109.310 deal with the time frames for preserving records and the procedures by which they may be destroyed.

Both the statutory open records provisions of Chapter 109 and Chapter 610 apply to the records of state and local governmental entities. Nevertheless, Chapter 610 provides a wider gamut of remedies available to private individuals, including: the judicial enforcement of the Sunshine Law, the voiding of governmental actions taken in violation of the Sunshine Law, a fine limited to five-hundred dollars that may be levied against the governmental entity or official who purposely violates the provisions of the Sunshine Law, and payment "of all costs and reasonable attorney fees to any party successfully establishing" such purposeful violation of the Sunshine Law.

The Missouri Court of Appeals for the Western District of Missouri stated, in dicta, that "the legislature added to [Section] 610.027 the remedies of civil fines and the voiding of legislation... to beef up and to deter violation of the... stated public policy of the law... to open the business of government to the people." However, courts have placed some bounds on the added remedy of Subsection 3 fines. In Spradlin v. City of Fulton, a taxpayer sued for judicial

60. Neely, supra note 39, at § 15.01.
66. See Neely, supra note 39, at § 15.02.
72. See Spradlin v. City of Fulton, 982 S.W.2d 255, 261-62 (Mo. 1998) (finding that statutes allowing awards of attorney fees may be penal and, therefore, must be
enforcement of the open meetings provisions in Chapter 610 and sought an award of attorney fees under Subsection 3. The Missouri Supreme Court noted that "[t]he plain language of the statute only authorizes assessment of attorney[] fees against an individual upon a demonstration of a 'purposeful' violation of the law." Furthermore, the court stated that "in many situations, statutes allowing for an award of attorney fees are 'penal in nature and must be strictly construed.'" The court further declared that the public policy explicit in Missouri's Sunshine Law "relates only indirectly, if at all, to the attorney[] fees penalty provided in [S]ection 610.027.3." Nevertheless, the various remedies provided in Chapter 610 are not exclusive. Rather, they are supplemental "to those provided by any other provision of law." Offering far fewer remedies, Section 109.180 provides that an official in violation "shall be subject to removal or impeachment and . . . shall be deemed guilty of a misdemeanor." As a result of the broader range of remedies available under Chapter 610, plaintiffs are likely to prefer to invoke Chapter 610 when taking action based on a public records violation.

To do so, plaintiffs first must meet the definition of "public record" as set forth in Section 610.010(6) as "any record, whether written or electronically stored, retained by or of any public governmental body." "Retained," a key term in that definition, has been interpreted by the Western District to have its plain and ordinary meaning, which is "to hold or continue to hold in possession or use; continue to have . . . ; maintain, in one's keeping." The Eastern District established a similar meaning of "retain" by holding, in part, that to have

strictly construed, and holding, in pertinent part, that a purposeful violation of Missouri Revised Statutes Section 610.027.3 must be shown to trigger such an award; Shields, 771 S.W.2d at 104; see also supra notes 9, 55.
3. 982 S.W.2d 255 (Mo. 1998).
4. Id. at 258.
5. Id. at 261.
8. Spradlin, 982 S.W.2d at 262.
11. MO. REV. STAT. § 109.180 (2000); see NEELY, supra note 39, at § 15.02.
actual and "legal control over the [records in question is] to retain them for purposes of the [Sunshine Law]."\textsuperscript{84}

Giving further meaning to what constitutes a public record under the Missouri Sunshine Law are the exemptions provided in Section 610.021.\textsuperscript{85} These exemptions are to be given strict construction pursuant to Section 610.011.\textsuperscript{86}

\textbf{B. Determination Remedies and Attorney Fees}

The Missouri Sunshine Law establishes a mechanism in Subsection 5 whereby a governmental entity that "is in doubt about the legality of closing a particular meeting, record or vote may bring suit at the expense of that public governmental body in the circuit court of the county of the public governmental body's principal place of business to ascertain the propriety of any such action."\textsuperscript{87} Subsection 5 also allows governmental bodies to "seek a formal opinion of the attorney general or an attorney for the governmental body."\textsuperscript{88} Very few states explicitly have established mechanisms in their open records laws that specifically enable governmental entities to obtain legal guidance proactively from an external decision maker, such as a court or the attorney general, regarding the propriety of closing a record.\textsuperscript{89}

Subsection 5, which enables governmental entities to turn to the courts for declaratory judgment on whether Chapter 610 allows closure of a given record, sets forth that such a suit may be brought "at the expense of that public governmental body."\textsuperscript{90} In interpreting this phrase, both the Western District and

\begin{itemize}
\item \textbf{84.} Tipton v. Barton, 747 S.W.2d 325, 329 (Mo. Ct. App. 1988).
\item \textbf{85.} See Mo. Rev. Stat. \textsection{} 610.021 (2000). These exemptions include: real estate transactions, employee personal information and individual personnel actions and files, state militia or National Guard records, individualized nonjudicial mental or physical health proceedings, scholastic records, testing and examination materials, individualized welfare cases, public employee negotiations materials, software and related documentation, competitive bidding specifications prior to approval or publication by the public governmental body, sealed bids prior to opening and contract negotiations prior to final action, individual personnel records of employees and applicants, except for "the names, positions, salaries and lengths of service of officers and employees of public agencies," "[r]ecords which are protected from disclosure by law," proprietary scientific and technological innovations, "abuse and wrongdoing" hot line records, auditor work product, and municipal electric utility financials and business plans related to restructuring. Mo. Rev. Stat. \textsection{} 610.021 (2000).
\item \textbf{87.} Mo. Rev. Stat. \textsection{} 610.027.5 (2000).
\item \textbf{88.} Mo. Rev. Stat. \textsection{} 610.027.5 (2000).
\item \textbf{90.} Mo. Rev. Stat. \textsection{} 610.027.5 (2000).
\end{itemize}
the Southern District have concluded that the statute purports to obligate the governmental body to shoulder all suit-related expenses—including the reasonable attorney fees of the record-requesting party. The courts reached these congruent holdings by considering the underlying public policy toward openness on one hand and the liberal construction mandate on the other.

Being the first court to address the issue, the Western District found that the phrase "at the expense of that public governmental body" in Subsection 5 was ambiguous. As a result, the court in State ex rel. Missouri Local Government Retirement System v. Bill consulted the canon of statutory construction against surplusage and looked to the express policy of Missouri’s Sunshine Law in Section 610.011.1, which calls for the liberal construction of Sections “610.010 to 610.028” in order to promote the policy of openness in government. In so doing, the court concluded that prior to the Sunshine Law’s enactment, governmental bodies were already obligated to pay their own litigation-related expenses; thus, the provision must make the governmental body liable for the record seeker’s attorney fees. Based on this analysis, the court held that “[n]ot requiring the public governmental body to bear [the record seeker’s] expenses would open a means for public governmental bodies to thwart the public policy underlying the open meetings and records law.” Furthermore, the court noted that to hold otherwise would enable a governmental entity “to ‘test’ the determination of anyone requesting its records by filing a lawsuit, putting that

91. See City of Springfield v. Events Publ’g Co., 951 S.W.2d 366, 374 (Mo. Ct. App. 1997) (The court held, in pertinent part, “that the legislature meant that a public governmental body should pay the attorney fees of its opponent when such body brings a declaratory judgment [action] pursuant to [Section] 610.027.5” because the “public body would bear any burden of expense for the other two options under [Section] 610.027.5.”). The court cited State ex rel. Missouri Local Government Retirement System v. Bill, 935 S.W.2d 659, 665-66 (Mo. Ct. App. 1996), which held, in pertinent part, that interpreting the phrase “at the expense of the public governmental body” in Subsection 5 to mean something other than that the public body filing the suit must bear all of the litigation expenses, including the respondent’s attorney fees, would “thwart the public policy underlying the open meetings and records law.”). See also NEELY, supra note 39, at § 15.13.

92. See supra note 91.
93. Bill, 935 S.W.2d at 665.
94. 935 S.W.2d 659 (Mo. Ct. App. 1996).
95. Id. at 666. In applying the canon, the court stated that “[w]e should not interpret statutes in a way which will render some of their phrases to be mere surplusage . . ., and [w]e must presume that every word of a statute was included for a purpose and has a meaning.” Id. (citing Hadlock v. Dir. of Revenue, 860 S.W.2d 335, 337 (Mo. 1993)).
97. Bill, 935 S.W.2d at 666.
98. Id.
99. Id.
person in the dilemma of not defending his or her request in court or enduring the significant expense of doing so.”

Building on the Western District’s holding in Bill regarding the assessment of attorney fees under Subsection 5, the Southern District in City of Springfield v. Events Publishing Co. note[d] that a public body would bear any burden of expense for the two other options under [Section] 610.027.5. The court then held that because “the public governmental body chooses what avenue to take under [Section] 610.027.5, and must bear the expenses of the other two options, it follows that the public governmental body must bear all of the expenses of an action for declaratory judgment.”

IV. THE INSTANT DECISION

In Hemeyer, the Missouri Supreme Court began by stating that “[a]ll public records shall be open to public for inspection and duplication” based on the provisions of Section 610.011.1 and Section 610.015. The court then framed the first issue as “whether the videotape is ‘any record . . . retained by or of any public governmental body.’” Noting that Chapter 610 provides no definition for “retain,” a key word in Chapter 610’s “public record” definition, the court gave the term its plain and ordinary meaning, which is “to hold or continue to hold in possession or use; continue to have, use, recognize, or accept; maintain in one’s keeping.” Furthermore, the court noted that “[t]he plain and ordinary meaning of the word ‘retain’ does not specify a length of time for holding or maintaining.” As a result, the court found that the sheriff, a public governmental body by the stipulation of the parties, “retained the tape of the state representative’s booking” because the sheriff kept booking tapes “for at least four-and-a-half days” before they were reused.

Next, the court explained “that the definition [of record] in [Section] 109.210(5) is expressly limited to the ‘State and Local Records Law,’ [S]ections

100. Id.
102. Id. at 374. The other options provided in Subsection 5 are seeking an opinion from the body’s legal counsel or seeking an opinion from the attorney general. See Mo. REV. STAT. § 610.027.5 (2000).
103. City of Springfield, 951 S.W.2d at 374.
104. Hemeyer v. KRCG-TV, 6 S.W.3d 880, 882 (Mo. 1999).
105. Id.
106. See supra text accompanying note 82.
107. Hemeyer, 6 S.W.3d at 882 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1938 (1976)). This mirrors the approach taken by the Missouri Court of Appeals for the Western District of Missouri in Missouri Protection & Advocacy Services v. Allan, 787 S.W.2d 291, 293 (1990). See supra text accompanying note 83.
108. Hemeyer, 6 S.W.3d at 882.
109. Id.
109.200 to 109.310." The State and Local Records Law "determines the period of time records are retained" by "authoriz[ing] the Secretary of State, the Director of Records Management, State Records Commission, and Local Records Board—upon recommendation by state and local agency heads—to establish the length of time that records are kept." Moreover, the court emphasized that records and nonrecord materials, alike, "require approval of the [State Records] Commission or [Local Records] Board before they may be destroyed" pursuant to Sections 109.260, 109.270, and 109.310.

The court then turned its attention to Chapter 610, which governs access to records pursuant to Sections 610.010(6) and 610.015. The court noted that these provisions were reinforced by Section 610.011.1, which expressly states the public policy toward openness, and mandates liberal construction of Section 610.010 through Section 610.028 and strict construction of their exceptions.

Following these findings, the court held that, based on "the statutory mandate of liberal construction," the videotape retained by the sheriff for four-and-a-half days constituted a public record pursuant to Chapter 610.

After discounting issues brought up by the Missouri Attorney General as amicus curiae on behalf of KRCG-TV because they were not raised by the parties in their pleadings, the court turned to the awarding of attorney fees pursuant to Subsection 5. Finding that the sheriff initially brought the suit to obtain a summary judgment on "the propriety of 'closing' the booking videotape" by invoking Subsection 5, the court considered the lower courts' interpretations of the phrase "suit at the expense of that public governmental body," contained in Subsection 5 in Bill and City of Springfield. The court noted the Western District's reasoning that because "the public body was obligated—before the statute's enactment—to bear its own expenses, the phrase must refer to the other party's expenses." To hold otherwise "would open a means for public governmental bodies to thwart the public policy underlying the [Sunshine] [L]aw" by enabling the body "to 'test' the determination of anyone requesting its records by filing a lawsuit, [thereby] putting that person in the

110. Id.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
116. Id. "As amicus curiae, the attorney general argue[d] that the booking videotape should be governed by the rules on 'investigative reports' in [S]ections 610.100 to 610.150." Id.
117. Id. at 882-83.
118. Id. at 883; see supra text accompanying notes 91-103.
dilemma of not defending his or her request in court or enduring the significant expense of doing so."120 Furthermore, the court noted that such a result would be absurd and would make a mockery of Section 610.026.1, which provides that reasonable fees may be charged for records.121

Moving on to the Southern District’s analysis of the phrase in Subsection 5 provided in City of Springfield,122 the Hemeyer court remarked on how the Southern District considered and built upon the Western District’s decision in Bill.123 The Southern District did so by employing the liberal construction mandate in Chapter 610 to “constru[e] ‘suit at the expense of that public governmental body’ [as] mean[ing] that the public body must pay the attorney fees of the party it sues under [S]ection 610.02[7].5.”124

Finally, distinguishing the instant case from Spradlin,125 a case previously decided by the court in which a taxpayer unsuccessfully sought an award of attorney fees under Subsection 3 based on a purposeful violation of the Sunshine Law, the Missouri Supreme Court found that the action in Hemeyer was governed by Subsection 5.126 In so doing, the Missouri Supreme Court held that the suit is “‘at the expense of the public governmental body’” pursuant to Subsection 5 and remanded the case “to the circuit court for an award of KRCG-TV’s expenses, including reasonable attorney fees.”127

Judge Holstein concurred with the majority’s decision with the exception of the award of attorney fees pursuant to Subsection 5.128 Dissenting in this part of the opinion, Judge Holstein, with whom Chief Justice Price and Judge Limbaugh joined, noted that Subsection 5 must be “liberally construed to promote the public policy that public records are to be open to the public,” pursuant to Section 610.011.1.129 Judge Holstein then stated that the majority’s construction was too liberal in that it would bring about an absurd result that would have required the sheriff to pay the television station’s attorney fees even if the sheriff had prevailed in the suit.130 The dissent posited that such a result would not promote access to public records.131 Rather, it would “discourage public governmental bodies from taking the initiative and going to court to determine whether the information sought is indeed a public record where it has

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120. Bill, 935 S.W.2d at 665-66.
121. See Hemeyer, 6 S.W.3d at 883.
123. See Hemeyer, 6 S.W.3d at 883.
124. Id.
125. See supra text accompanying notes 73-78.
126. See Hemeyer v. KRCG-TV, 6 S.W.3d 880, 883-84 (Mo. 1999).
127. Id. at 884.
128. Id.
129. Id.
130. Id.
131. Id.
reasonable doubt” because “no right thinking governmental body will . . . seek judicial advice, knowing that it must pay for all the other parties’ attorney fees.” To avoid incurring such expenses, the dissent asserted that, in the future, when a public governmental body has doubt about the propriety of disclosure, it will “let the party seeking the information go to court first”—a result “wholly inconsistent with promoting disclosure.”

The dissent continued by noting that “parties are not entitled to an award of attorney[] fees absent a contract, [a] statute allowing for the award or in rare equitable situations,” and pointed to the fact that Subsection 5 does not expressly mention such an award but, rather, it contains the term “expense.” The dissent asserted that the plain meaning of “expense” was limited to barring a governmental body from charging the record-requesting party “any fee for the [body’s] cost in bringing suit” and did not extend to the payment of the record-requesting party’s attorney fees. According to the dissent, this meaning can be clarified when Subsection 5 is read in tandem with Section 610.026.1, which limits fees charged by governmental bodies to those “‘reasonable . . . for providing access to’ public records.” Furthermore, the dissent stated that “the General Assembly has demonstrated that it knows how to provide for the award of attorney[] fees in ‘open records’ cases by making specific provision therefore in another subsection of the same statute”—referring to Subsection 3. Therefore, the dissent concluded that “it is contrary to both the canons of construction and sound reason to say that the legislature had a secret intent to award such fees in other circumstances” and that the majority’s opinion will lead to results that are inconsistent with the promotion of disclosure.

V. COMMENT

In Hemeyer, the Missouri Supreme Court narrowly distinguished the case at bar from its prior decision in Spradlin by parsing the Sunshine Law’s remedial provision, Section 610.027. By its action, the court preserved the fundamental public policy of open government expressed prominently in Section

132. Id.
133. Id.
134. Id.
135. Id. at 885.
136. Id. at 884-85.
137. Id. at 885.
138. Id.
139. Id.
140. See supra text accompanying notes 73-78.
First, the majority in *Hemeyer* was correct in distinguishing the instant case from *Spradlin*, the case in which a concerned citizen brought suit to enforce the open meetings components of the Sunshine Law and requested attorney fees under Subsection 3. *The moving parties in *Hemeyer* and *Spradlin* invoked the Sunshine Law's remedial provision.* However, Subsection 3 invoked by Spradlin, the Fulton taxpayer, is designed specifically for "[a]ny aggrieved person, taxpayer to, or citizen of, this state, or the attorney general or prosecuting attorney." *Subsection 5 invoked by Sheriff Hemeyer, however, is the only subsection of the remedial provision designated for use by the public governmental bodies governed by the Sunshine Law.*

Yet another distinction between the cases is that Missouri courts, including the Missouri Supreme Court, have held that Subsection 3 was penal in nature, whereas no such finding has been made with regard to Subsection 5. In *Spradlin*, the Missouri Supreme Court stated that "in many situations, statutes allowing for an award of attorney['] fees are 'penal in nature and must be strictly construed.'" Furthermore, the court noted that "the policy [that favors

145. See Spradlin v. City of Fulton, 982 S.W.2d 255, 258 (Mo. 1998).
146. See Hemeyer v. KRCG-TV, 6 S.W.3d 880, 881 (Mo. 1999); Spradlin, 982 S.W.2d. at 258.
150. Spradlin, 982 S.W.2d at 261 (quoting Frisella v. Reserve Life Ins. Co. of Dallas, 583 S.W.2d 728, 735 (Mo. Ct. App. 1979); Hay v. Utica Mut. Ins. Co., 551 S.W.2d 954, 957 (Mo. Ct. App. 1977)) (citing State Farm Mut. Auto. Ins. v. Thomas, 316 S.W.2d 571 (Ark. 1954); Lummus v. Shoney's of LaPlace, 713 So. 2d 1290 (La. Ct. App. 1998); Lee McGuire 1900 Co. v. Inventive Indus., 566 S.W.2d 95 (Tex. Civ. App. 1978)). The Missouri Court of Appeals for the Western District of Missouri found in *Shields* that "[a] statute, which is penal in nature, must be strictly construed" and that statutes that impose a fine are penal. *Shields*, 771 S.W.2d at 104. Moreover, the *Shields* court found that "[w]here a fine for violation of a statute is paid into the registry of the court . . . the fine is to be considered both as a punishment to the wrongdoer and a deterrent to others." *Id.* Based on these findings, the *Shields* court held, in part, that "Section 610.027.3 is penal because it imposes a fine" and, therefore, must be strictly construed, whereas "[t]he other portions of the statute . . . are to be liberally construed." *Id.*
openness] relates only indirectly, if at all, to the attorney[] fees penalty provided in [S]ection 610.027.3 . . . [and] the contrary policy requiring strict interpretation of penal statutes controls.\textsuperscript{151} However, the court limited its strict interpretation to Subsection 3 rather than applying it to the entirety of the Sunshine Law’s remedial provision.\textsuperscript{152} In so doing, the court noted that its limitation of Subsection 3 does not take the bite out of the other remedies provided by the Sunshine Law.\textsuperscript{153} The Hemeyer decision not only distinguishes between the two subsections, but it also places boundaries on the “strict interpretation” language used in Spradlin regarding Subsection 3,\textsuperscript{154} which provides for the imposition of civil fines upon purposeful violation of the Sunshine Law.\textsuperscript{155} This limitation of Spradlin is appropriate as the public policy statement regarding openness in Section 610.011.1 specifically mandates that “Sections 610.010 to 610.028 shall be liberally construed . . . to promote this public policy.”\textsuperscript{156} As Subsection 5 falls within the range of sections to be liberally construed, limitation of Subsection 5 would be inappropriate.

Moreover, the majority’s decision in Hemeyer neither eviscerates the public policy underlying the Sunshine Law\textsuperscript{157} nor completely eliminates the likelihood of a public governmental body’s proactive initiation of a suit to obtain summary judgment on closing a record,\textsuperscript{158} as the dissent suggests.\textsuperscript{159} Instead, it strengthens the policy of openness in government by refusing to allow a public governmental body from financially bullying less resourceful and committed record seekers into forgoing their right of access to public meetings and records. This is achieved by making the outcome of the governmental entity’s suit irrelevant and by causing the governmental body that initiates a suit pursuant to Subsection 5

\textsuperscript{151} Spradlin v. City of Fulton, 982 S.W.2d 255, 262 (Mo. 1998).
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} In distinguishing between Spradlin and the instant case, the majority pointed out that:

Here, the public governmental body sued to determine whether it should disclose the videotape. Thus, this suit is governed by [S]ection 610.027.5, and is “at the expense of the public governmental body.” In Spradlin, a taxpayer sued. Suits for “judicial enforcement” of [C]hapter 610 are governed by the first four [S]ubsections of 610.027. Therefore, in Spradlin, the awarding of attorney fees was governed by [S]ection 610.027.3. Spradlin does not control the award of attorney fees under [S]ection 610.027.5.

Hemeyer v. KRCG-TV, 6 S.W.3d 880, 883-84 (Mo. 1999) (citations omitted).

\textsuperscript{155} See MO. REV. STAT. § 610.027.3 (2000).
\textsuperscript{156} MO. REV. STAT. § 610.011.1 (2000).
\textsuperscript{157} See MO. REV. STAT. § 610.011.1 (2000).
\textsuperscript{158} See MO. REV. STAT. § 610.027.5 (2000).
\textsuperscript{159} See Hemeyer, 6 S.W.3d at 884-85.
to assume responsibility for all suit-related expenses. These suit-related expenses include the reasonable attorney fees of the record seeker.\textsuperscript{160}

Furthermore, it bears noting that Subsection 5 provides multiple proactive options for public governmental bodies that are "in doubt about the legality of closing a particular meeting, record or vote."\textsuperscript{161} These options include "bring[ing] suit at the expense of that public governmental body" and "seek[ing] a formal opinion of the attorney general or an attorney for the governmental body."\textsuperscript{162} In addition, the governmental body can elect to do nothing, deny access, and wait until the record seeker files an enforcement suit, as the dissent noted.\textsuperscript{163} The governmental body has the freedom to choose among these options—all of which have a price tag. Some options may be more palatable than others given the situation in question. Many variables are likely to play into the body's decision, including the expected total cost of the action, precedential value, timeliness of the decision, and the impact of negative publicity associated with being accused of or, worse, found guilty of violating the Sunshine Law.\textsuperscript{164} Moreover, the Missouri Supreme Court has noted that "[a]bsent a contrary showing, there is a presumption of regularity of agency action."\textsuperscript{165} If this presumption is to be given full effect, then governmental entities should be given the benefit of the doubt that they operate in a manner that is in the best interest of the public. As a result, it is somewhat rash to posit, as the dissent did in Hemeyer,\textsuperscript{166} that a governmental entity will never choose the option of bringing suit under Subsection 5, even if the entity will be required to pay the legal fees of the record-seeking party.

By placing the financial responsibility on a governmental body that exercises its right to bring suit under Subsection 5, the Hemeyer decision bolsters the axiomatic public policy of openness in government declared in Section 610.011.1. This tenet is restated throughout the Sunshine Law. For instance, Section 610.015 governs the recording of votes and reiterates that "[a]ll public meetings shall be open to the public and public votes and public records shall be

\begin{itemize}
  \item \textsuperscript{160} Id. at 883; see supra text accompanying notes 119-24.
  \item \textsuperscript{161} Hemeyer v. KRCG-TV, 6 S.W.3d 880, 883 (Mo. 1999).
  \item \textsuperscript{162} MO. REV. STAT. § 610.027.5 (2000).
  \item \textsuperscript{163} See Hemeyer, 6 S.W.3d at 884 (stating that "if that governmental entity waits and lets the party seeking the information file suit first, that governmental body will only pay the other side's attorney fees if it is found to have purposefully violated [Sections] 610.010 to 610.020").
  \item \textsuperscript{164} See generally Eric Stern, Sunshine Law May Be Routinely Violated, Officials Say Bill Would Put More Bite Into Missouri Statute, ST. LOUIS POST-DISPATCH, Apr. 10, 2000, at B1 (quoting Larry Markenson of the Missouri Municipal League as stating: "The real penalty is public humiliation and embarrassment" and "[w]ho wants to be found guilty of violating the open meetings laws?").
  \item \textsuperscript{165} State v. Thompson, 627 S.W.2d 298, 301 (Mo. 1982).
  \item \textsuperscript{166} See Hemeyer, 6 S.W.3d at 885.
\end{itemize}
open to the public for inspection and duplication."167 Furthermore, Section 610.022 establishes limitations on and procedures for closing meetings,168 and repeats that "[p]ublic records shall be presumed to be open unless otherwise exempt pursuant to the provisions of this chapter."169 Even beyond the strictures of the Sunshine Law, the policy of open access in government surfaces in other Missouri record-related statutes that were in effect at the time of the Hemeyer decision.170 For example, Section 109.180 mandates that "[e]xcept as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen."171 Section 374.070 directs the handling of documents by the Department of Insurance and commands that "[t]he office shall be a public office and the records shall be public records and shall at all times be open to the inspection of the public."172 Finally, Section 32.091 controlled the disclosure of motor vehicle records and recapitulated that "[i]t is the public policy of this state that records be open to the public unless otherwise provided by law" and that "disclosure provisions . . . shall be liberally construed and the exemptions strictly construed to promote this public policy."173 In light of the notions of openness and access that underlie these record-related Missouri statutes, the Hemeyer decision harmonizes with the fundamental underpinning of democratic government held by Missourians and recognized by the General Assembly. This can be best summarized as "[a]n open society needs open institutions making open decisions openly arrived at."174

Finally, the Hemeyer decision, which makes public governmental bodies that bring an action under Subsection 5 liable for the record-seeker's attorney fees pursuant to the language of the provision, comes at a critical time.175 According to the 1999 Audit of Compliance with Sunshine Law Requirements, State Auditor Claire McCaskill concluded that "[a]n estimated 1,649 of 3,459 (47.6%) political subdivisions would not respond properly to requests for information under provisions of the Sunshine Law."176 In light of this audit, any

167. MO. REV. STAT. § 610.015 (2000); see supra text accompanying note 58.
169. MO. REV. STAT. § 610.022.5 (2000); see supra text accompanying note 57.
171. MO. REV. STAT. § 109.180 (2000); see supra text accompanying notes 61, 81.
175. See MCCASKILL, supra note 43; Stern, supra note 164, at B1.
176. MCCASKILL, supra note 43. The audit was conducted due to "recent citizen concerns and lawsuits over access to public records." MCCASKILL, supra note 43. Variance from the Sunshine Law included lack of response, denials, and late responses.

https://scholarship.law.missouri.edu/mlr/vol66/iss2/5
legal action that puts teeth in Missouri's Sunshine Law in order to buoy its public policy, whether undertaken by a court or the legislature, is much needed, and the Hemeyer decision is one step in that direction. As a result of decisions such as Hemeyer, state and local governmental entities may become more aware of, educated about, and compliant with Missouri's Sunshine Law.

VI. CONCLUSION

In Hemeyer v. KRCG-TV, the Missouri Supreme Court interpreted the phrase "at the expense of that public governmental body" in Subsection 5 of the Sunshine Law's remedial provision to mean that the public governmental body initiating a suit for summary judgment on closure of a record under Missouri's Sunshine Law is liable for the attorney fees of the record seeker. By reaching this result, the court upheld the public policy of openness in government that buttresses the Sunshine Law, as well as other Missouri record-related statutes. While imposing costs on governmental entities, which ultimately must be paid from tax coffers, the financial costs imposed by the court's decision in Hemeyer are slight when compared to the costs of compromising a fundamental tenet of democratic government—the concept of open government.

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The results were based on "a random statistical sample of 214 political subdivisions" statewide. McCaskill, supra note 43. The selected sample of 214 entities were "sent a request for the minutes of their last board meeting held in the calendar year 1998." McCaskill, supra note 43.